Nos. 1269 and 1270

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CENTRAL BANK AND TRUST COMPANY, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

DAGES I. BOYLE, *Appellant*

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*

On Appeals from the United States District Court for the Eastern District of Kentucky

MOTION TO AFFIRM OF APPELLEES FIRST NATIONAL BANK AND TRUST COMPANY OF LEXINGTON, SECURITY TRUST COMPANY, AND FIRST SECURITY NATIONAL BANK AND TRUST COMPANY OF LEXINGTON

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Appellees First National Bank and Trust Company of Lexington ("First National"), Security Trust Company ("Security Trust"), and First Security National Bank and Trust Company of Lexington ("First

Security")[1] move pursuant to Rule 16 of the Rules of this Court that the order and judgment of the district court, entered on December 29, 1967, be affirmed with respect to the questions raised by the appeals in Nos. 1269 and 1270, on the ground that it is manifest that the questions on which the decision of these causes depend are so unsubstantial as not to need further argument.

QUESTIONS PRESENTED

The questions on which the decision of these appeals depends are as follows:

1. Whether the district court properly entered the final judgment proposed by the United States and First Security.

2. Whether the consent of the intervening parties to the terms of the judgment proposed by the United States and First Security was required before the district court could enter that judgment.

3. Whether the Bank Merger Act amendment of 1966 is constitutional insofar as it enacted a conclusive presumption that the consolidation of First National and Security Trust did not violate section 1 of the Sherman Act, when such enactment occurred after this Court's judgment that the consolidation violated section 1 but before the execution of an order of divestiture entered in conformity with that judgment.

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[1] First National and Security Trust were consolidated with the name First Security National Bank and Trust Company of Lexington pursuant to a new charter issued by the Comptroller of the Currency on March 1, 1961. On that date First National and Security Trust ceased to operate as separate entities.

STATEMENT

On March 1, 1961 First National Bank and Trust Company of Lexington and Security Trust Company consummated a consolidation that had been theretofore approved by the Comptroller of the Currency. On the same day a complaint was filed by the United States alleging that the consolidation violated sections 1 and 2 of the Sherman Act (Doc. 1).[2]

The case came on for trial in February 1962, and on July 27, 1962 the district court (Ford, J.) entered its opinion holding that the consolidation did not violate either section 1 or section 2 of the Sherman Act. *United States* v. *First Nat'l Bank & Trust Co.*, 208 F. Supp. 457 (E.D. Ky. 1962). An appeal was duly taken to this Court by the United States from the district court's judgment. In this Court the United States contended that the district court erred on both counts and that the consolidation violated both section 1 and section 2 of the Sherman Act.

In April 1964 this Court held that the consolidation violated section 1 of the Sherman Act. *United States* v. *First National Bank & Trust Co.*, 376 U.S. 665 (1964). Pursuant to that holding the Court reversed the judgment of the district court and remanded the case to the district court for further proceedings in conformity with the opinion of this Court. Notably, this Court did not upset the district court's ruling that the consolidation did not violate section 2 of the Sherman Act,[3] nor did it direct divestiture.

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[2] This Motion will follow the system of record citation employed by appellant Central (Central Jurisdictional Statement, p. 4 n.2).

[3] The Court stated (376 U.S. at 673):

> In view of our conclusion under § 1 of the Sherman Act, we do not reach the questions posed under § 2.

After the case was remanded, the parties, on February 16, 1965, filed in the district court a stipulation proposing a decree to be entered by the district court. (Doc. 164.) The proposed decree recited that the consolidation violated section 1 of the Sherman Act.[4] The district court (Swinford, J.) rejected the form of decree proposed by the parties, and on March 18, 1965 entered a separate order.[5] (Doc. 178; App. G to Jurisdictional Statements.)

On February 21, 1966, Congress enacted an amendment to the Bank Merger Act of 1960.[6] P.L. 89-356, 80 Stat. 7. This amendment had two principal purposes: First, it "forgave" from any violations of the antitrust laws (except section 2 of the Sherman Act) all mergers that had been consummated before June 17, 1963[7] and that had not, as of the date of the

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[4] The proposed decree made no reference to section 2 of the Sherman Act.

[5] The court's order of March 18, 1965, was amended and clarified by a subsequent order of April 29, 1965. (Doc. 191; App. H to Jurisdictional Statements.) As amended, the court's order was essentially similar to the decree originally proposed by the parties.

[6] Although the amendment was not enacted until 1966, the legislative proceedings that led to its enactment began in April 1965—shortly after the district court entered its decree in this case—with the introduction of S.1698, the bill that was eventually enacted into law with a number of amendments. S. 1698 was passed by the Senate on June 11, 1965.

[7] This was the date of this Court's decision in *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321 (1963).

In the *Philadelphia* case, this Court held that a merger transaction approved under the Bank Merger Act of 1960 was not thereby immune from the antitrust laws. In amending the Act in 1966, Congress expressed the belief that prior to this decision it was not clear that the 1960 Act created no such immunity. In view of this uncertainty it was felt, therefore, that banks that had merged on the good faith assumption that such an exemption existed should not be required to split apart upon a subsequent judgment of antitrust illegality. H. Rep. No. 1221, 89th Cong., 2d Sess. 4-5 (1966).

amendment, been dissolved pursuant to a final antitrust judgment. Second, it established new standards and procedures for determining the legality of subsequent mergers.[8] The forgiveness of "pre-*Philadelphia*" mergers was accomplished by the enactment of a conclusive presumption in section 2(a) of the 1966 amendment:

> Any merger, consolidation, acquisition of assets, or assumption of liabilities involving an insured bank which was consummated prior to June 17, 1963, the bank resulting from which has not been dissolved or divided and has not effected a sale or distribution of assets and has not taken any other similar action pursuant to a final judgment under the antitrust laws prior to the enactment of this Act, shall be conclusively presumed to have not been in violation of any antitrust laws other than section 2 of the Act of July 2, 1890 (section 2 of the Sherman Antitrust Act, 15 U.S.C. 2).

Some two months after the enactment of the 1966 amendment the United States moved the district court for an adjudication that the consolidation violated section 2 of the Sherman Act and prayed that a final judgment of divestiture be entered pursuant to that adjudication. (Doc. 202.) The district court denied this motion on February 1, 1967, for two reasons: First, the court held that because the Supreme Court had not reversed the 1962 ruling by the district court that the merger did not violate section 2 of the Sherman Act, the 1962 ruling was the law of the case.[9] Second, the

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[8] The provisions of the 1966 amendment setting forth these new standards and procedures were before the Court in *United States* v. *Third Nat'l Bank of Nashville*, — U.S. — (1968) and *United States* v. *First City Nat'l Bank*, 386 U.S. 361 (1967).

[9] Judge Swinford recognized that he had power to reexamine the earlier ruling if there were patent error in it, but he found no such error in the record. (Doc. 208, p. 3.)

court was of the opinion that in enacting the 1966 amendment Congress intended that the consolidation under attack in this case should not undergo divestiture.[10] (Doc. 208.)

The United States' notice of appeal to this Court from the district court's order was filed March 31, 1967. (Doc. 210.) The time for docketing the record in this Court was extended while the parties negotiated an agreed form of judgment to present to the district court. Such proposed judgment was filed by stipulation of the parties on August 7, 1967. As amended on September 1, 1967, this stipulation provided that the proposed judgment could be entered by the court at any time after 40 days from the filing of the stipulation. In accordance with its usual practice the United

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[10] This is amply supported by the legislative history. The report of the House Committee on Banking and Currency stated that the banks that had merged prior to the *Philadelphia* decision—Manufacturers Hanover in New York, Continental Illinois in Chicago, and First Security in Lexington—

> should not be required to suffer the confusion, the disruption, and the losses which would result from efforts to unscramble them.

H. Rep. No. 1221, 89th Cong., 2d Sess. 4 (1966). It is thus evident that while Congress did not intend to exculpate either past or present mergers from violations of section 2, it intended to relieve the pre-*Philadelphia* mergers from the far-reaching problems of divestiture. Indeed, statements in Floor debate by the Chairmen of the House and Senate Committees indicate their clear understanding that the amendment would actually end this litigation. *See* 112 Cong. Rec. 2334 (daily ed. Feb. 8, 1966) (remarks of Chairman Patman) (pre-*Philadelphia* mergers would "be granted exemption from further action by the Justice Department"); (112 Cong. Rec. 2538 (daily ed. Feb. 9, 1966) (remarks of Chairman Robertson) ("bill would terminate the three pre-*Philadelphia* cases now pending in court"). The Manufacturers Hanover and Continental Illinois cases were promptly dismissed after passage of the 1966 amendment.

States reserved the right to withdraw its consent to the proposed judgment within the 40-day period.[11]

During this period appellants Central Bank and Trust Company ("Central") and Dages I. Boyle ("Boyle") presented their views on the proposed decree to the Department of Justice. (Doc. 222, Affidavit of Garvice Kincaid, p. 4) In addition, appellants moved to intervene in this case for the purpose of opposing the proposed decree.[12] (Docs. 217, 225)

On December 29, 1967, the district court entered an order (1) granting appellants' motions to intervene as parties plaintiff, (2) denying the other relief requested by appellants, and (3) entering the final judgment proposed by the United States and the appellee banks. It is from this order that these appeals are taken.

ARGUMENT

I. THE DISTRICT COURT PROPERLY ENTERED THE FINAL JUDGMENT PROPOSED BY THE UNITED STATES AND FIRST SECURITY

The final judgment proposed to the court below by the appellees represented a good faith effort to terminate litigation that had been pending for six and one-half years. At the time the judgment was proposed, the consolidation of First National and Security Trust

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[11] The Justice Department's consent judgment policy is set forth in full at 28 C.F.R. § 50.1.

[12] Appellant Central filed motions asking (1) that the court not accept the proposed final judgment, and (2) that the court reconsider its order of February 1, 1967 denying the United States' motion for adjudication that the consolidation violated section 2 of the Sherman Act. (Docs. 220, 221.)

Appellant Boyle filed a motion asking the court not to accept the proposed final judgment and to enforce its divestiture order of March 18, 1965. (Doc. 227.)

had been immunized from further attack under any of the antitrust laws except section 2 of the Sherman Act. At that time, moreover, no court had ever held that the consolidation violated section 2.

The proposed judgment, as is the case with any settlement agreement, accommodated the interests of both the public and the appellee banks. From First Security's point of view, acceptance of the terms of the decree, which resulted from long and hard negotiations, was preferable to the uncertainty of additional protracted litigation.[13] From the public's point of view the decree imposed significant restraints upon First Security[14] even though the district court had twice ruled the consolidation not in violation of section 2 and this Court had never ruled to the contrary.

This Court has held that the scope of review in this Court of an antitrust decree entered by consent in a district court is an extremely narrow one. In *Sam Fox Publishing Co.* v. *United States,* 366 U.S. 683, 689 (1961), the Court indicated that the "wisdom of the

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[13] Inasmuch as the record in this case closed in 1962, First Security faced the substantial possibility, in the event an appeal had been pursued by the United States, that the record would be reopened and new evidence would have to be taken before the section 2 claim could be adjudicated. It was entirely possible, therefore, that this case could have continued for as long as two years more in active litigation.

[14] The decree enjoins First Security (1) for ten years from acquiring any other commercial bank having an office in Fayette County, (2) for five years from establishing any branch office in Fayette County if such action would give the bank more than one-third of the commercial bank offices in the county, and (3) for ten years from accepting any new nontestamentary trust accounts (except from officers, directors and employees of the bank).

Government's judgment in negotiating and accepting" a decree entered by the lower court should not be subject to review "at least in the absence of any claim of bad faith or malfeasance on the part of the Government." The appellants in this case expressly stated to the court below, in their attack on the proposed decree, that they were *not* charging the United States with bad faith or malfeasance. Indeed, they conceded that the Department of Justice was acting in good faith. (Doc. 252, Transcript of Hearing on Motions, pp. 52-53.)

The district court, of course, had to be satisfied before entering the decree that it would be equitable and in the public interest. *United States* v. *F & M Schaefer Brewing Co.*, 1968 Trade Cas. ¶ 72345 (E.D.N.Y. 1967); *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144, 147-48 (S.D.N.Y. 1962); *United States* v. *Radio Corp. of America*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). We submit that the court below did satisfy itself in this respect. The merits of the decree were fully argued before the district court and appellants raised all of the objections to the terms of the decree that are being raised in this Court. After a full day of oral argument and the submission of extensive briefs by the parties, the district court held that the proposed judgment should be entered. Despite the vigorous attack made upon the substance of the proposal by the appellants, the court did not find any merit in these arguments. Moreover, while the court indicated some surprise that the Government had elected to settle the case, it was careful to point out that it did "not mean to imply that the

United States has not conscientiously represented the public interest."[15] (Jurisdictional Statement, p. 6a.)

Finally, the fact that the lower court was fully aware of its duty to examine the substance of a proposed decree and its power to reject such a decree was amply evidenced in March of 1965, when the court rejected the earlier decree proposed by the parties and instead entered its own decree. It is inconceivable in view of this background that the court would have considered itself bound to enter *any* decree the parties may have agreed upon.

The appellants' attack on the proposed decree is, moreover, wholly without merit. Appellants' main contention is that the decree should have been rejected because it failed to provide for divestiture,[16] which, they argue, is the conventional remedy for a violation

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[15] This quotation from the court's opinion flatly contradicts appellant Central's suggestion (Jurisdictional Statement, p. 13) that the court recognized that the Government was *not* adequately representing the public interest. Moreover, contrary to Central's assertion (Jurisdictional Statement, p. 17) the court did *not* indicate that the *decree* was contrary to the public interest. The court's concern was that *any* settlement of the case at this stage of the litigation might create "a feeling of uneasiness in the public mind." The court did not question the Government's judgment with respect to the substance of the decree; it merely questioned its judgment "in not permitting this case to go to a final decision by the Supreme Court." Inasmuch as the court expressed this reservation it may be assumed the court would promptly have rejected the proposed decree if it believed that the terms of the decree were not in the public interest.

[16] Central also argues that the consent judgment "contains a large loophole" (Central Jurisdictional Statement, p. 24) because it does not preclude First Security from accepting nontestamentary trusts from "advisory" directors and that the bank could create an unlimited number of such directors. This argument is frivolous and was properly rejected by the district court. If First Security were to attempt to nullify the decree by wanton proliferation of advisory directors merely to secure their trust business appropriate relief could certainly be had in the district court.

of section 2 of the Sherman Act. This argument again fails to take account of the fact that the consolidation of First National and Security Trust has twice been adjudged not to be in violation of section 2 and has *never* been adjudged to violate that section. If, as appellants suggest, an antitrust case cannot be settled prior to final judgment except on the same terms that would be imposed after a judgment in favor of the United States, there is little incentive for defendants to settle.[17]

Moreover, assuming the United States had pursued an appeal successfully, the only violation of section 2 that could realistically have been expected would have related to the sub-market of corporate trust services, and presumably the ultimate relief would have been limited to that necessary to cure the anticompetitive effects in that market. Divestiture of trust business, or any part of it, is fraught with legal difficulties. Each trust sought to be divested would potentially have been the subject of ancillary proceedings in state courts to approve a substituted trustee, with the result that an unseemly clash between federal and state courts might have resulted. The United States sought to achieve a result comparable to divestiture by limiting First Security's ability to accept new trust business.[18]

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[17] There is a clear congressional policy, embodied in section 5 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. § 16, favoring settlement of Government antitrust litigation. *United States v. Ward Baking Co.*, 376 U.S. 327, 334 (1964).

[18] Government counsel pointed out to the district court that the decree's restrictions were designed to reduce First Security's share of the Trust market to 20 percent, by number of accounts, and to 50 percent by dollar value. (Doc. 252, Transcript of Hearing on Motions, p. 78.) The limitation of the restriction in the decree to nontestamentary trust business recognized the inequitable result that would otherwise occur when a testator who had named First Security as trustee of a testamentary trust died without knowledge of the bank's inability to accept such an appointment.

Finally, this Court itself has recognized in this very case the fact that there are peculiar difficulties relating to divestiture in a bank merger case.[19] As the Court pointed out in *First Security Nat'l Bank & Trust Co.* v. *United States*, 382 U.S. 34, 35 (1965)

> Neither the opinion nor the judgment of this Court [on the first appeal in this case] expressly dealt with the matter of remedy and neither ordered divestiture within any particular period of time. Compare *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 662 (decided the same day as the prior appeal in this case and directing the District Court to order divestiture without delay).

The implication of this language is that relief short of divestiture may be appropriate in a case involving mergers of commercial banks.

Moreover, as is amply clear from the legislative history of the 1966 amendment to the Bank Merger Act, the overwhelming considerations that moved Congress to forgive this very consolidation from the strictures of section 1 of the Sherman Act were the problems and inequities of divestiture. See S. Rep. No. 299, 89th Cong., 1st Sess. 7 (1965); H. Rep. No. 1221, 89th Cong., 2d Sess. 4-5 (1966); 112 Cong. Rec. 2334 (daily ed. Feb. 8, 1966) (remarks of Rep. Patman) ("A majority of your committee felt that . . . equity demanded further exemption of [pre-*Philadelphia*] mergers from prosecution because there was doubt prior to the *Philadelphia* case as to whether the antitrust laws applied to banks.").

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[19] As appellant Central has noted (Jurisdictional Statement, p. 22 n.7) problems of divestiture in this case were explicitly argued to this Court on First Security's Motion to Remand at the time of the first appeal.

II. THE CONSENT OF THE APPELLANTS WAS NOT A PREREQUISITE TO THE ENTRY OF THE PROPOSED JUDGMENT

Appellants contend that it was error for the district court to enter the judgment proposed by the appellees without the consent of the intervening plaintiffs.[20] This argument was not raised in the court below, and therefore need not be considered by this Court.

Apart from this, the argument is unsound as a matter of policy, for it would quite obviously prevent the settlement of *any* Government antitrust case in which a competitor of the defendant had been permitted to intervene. In addition, it totally misconceives the nature of a so-called "consent judgment" and appellants' status as interveners in this case.

The mere filing by the parties of an agreed form of judgment is not in itself sufficient to terminate the

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[20] Appellant Central also argues that the district court erred in failing to afford it "an opportunity, after it had become a party, to participate in relief hearings and settlement negotiations." (Central Jurisdictional Statement, pp. 3, 15) This argument is utterly frivolous. In the first place, despite the fact that the appellants filed voluminous pleadings in the district court, neither of them ever requested the lower court to hold evidentiary hearings on the merits of the proposed decree or to give them an opportunity to participate in settlement negotiations. This contention is not properly before this Court, therefore. Second, both appellants submitted detailed written and oral comments to the court below on the proper scope of relief and the merits of the proposed decree, and nothing in the arguments they raised warranted additional hearings on either the merits of the decree or the scope of relief. Finally, as is shown by Exhibit A to the "Plaintiff-Intervenor Complaint" filed by Central in the court below (Doc. 218), appellants have been in constant communication with the Department of Justice concerning this consolidation since at least April 1966. To this extent their views were comprehended in the negotiations that led to settlement of the case.

litigation.[21] Action by the court is necessary to give effect to the agreement, and such action constitutes more than the ministerial function of authenticating or recording the agreement of the parties. It involves an exercise of judgment and discretion. *United States* v. *Radio Corporation of America*, 46 F. Supp. 654, 655 (D. Del. 1942), *appeal dismissed*, 318 U.S. 796 (1943). It is well-established that under appropriate circumstances a court may adopt and enter a proposed judgment despite the fact that less than all of the parties to the case have consented to its terms. In *United States* v. *Carter Products, Inc.*, 211 F. Supp. 144 (S.D.N.Y. 1962), for example, a judgment proposed by the Government and one of two co-defendants in a civil action under sections 1 and 2 of the Sherman Act was entered over the objection of the nonconsenting defendant.[22] See also *United States* v. *Brunswick-Balke-Collender Co.*, 203 F. Supp. 657 (E.D. Wis.

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[21] *Compare* Fed. R. Civ. P. 41(a)(1)(ii), which provides that an action may be dismissed without order of court "by filing a stipulation of dismissal signed by all parties who have appeared in the action."

[22] In *Carter* the Government had attacked a licensing agreement under which Carter had given American Home Products Corporation an exclusive license (except as to Carter) to use and sell the drug meprobamate. Carter consented to a decree that required it to abrogate the exclusivity terms of the licensing agreement. Despite American's refusal to consent, and its claim that its contract rights would be affected by the decree, the court entered the proposed judgment. The court pointed out that American's rights could be asserted in a separate action on the contract against Carter.

1962) ("consent" judgment entered before trial over objections of Government).[23]

Moreover, while appellants contend that as interveners they are entitled to "all the rights of an original party." (Central Jurisdictional Statement, p. 13), this contention is obviously too broad. The procedural rights appellants acquired as interveners must be related both to the stage of the litigation at which they intervened and to the relief they sought.

It is clear that appellants' intervention at the stage of consent decree proceedings, long after trial and appeal, was for an extremely limited purpose. The only relief they prayed for in their complaints as intervening plaintiffs (Docs. 218, 226) was rejection of the proposed decree and reinstatement of the divestiture decree entered prior to the 1966 amendment to the Bank Merger Act. Adjudication of these claims did not require, nor did appellants request, discovery or evidentiary hearings.[24] The claims raised essentially

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[23] In other cases, courts have, by considering the merits of proposed decrees despite the fact that the parties had not unanimously consented, implicitly recognized that nonconsenting parties have no right to veto a proposed judgment simply by withholding consent. *United States* v. *Blue Chip Stamp Co.*, 272 F. Supp. 432 (C.D. Calif. 1967), *aff'd per curiam sub nom. Thrifty Shoppers Scrip Co.* v. *United States*, 389 U.S. 580 (1968); *United States* v. *Pan American World Airways, Inc.*, 1959 Trade Cas. ¶ 69,300 (S.D.N.Y. 1959).

[24] The only request made by appellants for further proceedings came in appellant Central's motion asking that the court reconsider its decision of February 1, 1967 denying the Government's motion for an adjudication under section 2. (Doc. 221.) In support of this motion, it urged the court to reopen the record to accept new evidence, proffered in the motion papers, relating to the section 2 issue. Despite the proffer, the court declined to reconsider its ruling sustaining the consolidation for the reasons it had set forth at the time it made that ruling. (Jurisdictional Statements, p. 8a.)

questions of law, and these questions were fully briefed and argued by all parties. Thus, appellants were given their full measure of procedural rights as interveners in the consent decree proceedings, and once their arguments were rejected it was entirely appropriate for the court to enter the decree.

It is also clear that entry of the decree had no effect upon substantive rights of the appellants. Appellants are still free to file a private antitrust action, premised upon an alleged violation of section 2 of the Sherman Act [25] and seeking treble damages [26] and equitable relief under sections 4 and 12 of the Clayton Act, 15 U.S.C. §§ 15, 26. If, as they contend here, they have any rights that are distinct from those of the public generally those rights may be vindicated in such a private

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[25] Indeed, appellants might have premised a private suit upon a violation of section 1 of the Sherman Act. While the appellee banks believe that the 1966 amendment would have precluded recovery in such a suit, appellants could have litigated there their contention that the 1966 amendment is unconstitutional insofar as it creates a conclusive presumption of lawfulness.

[26] A claim for damages by appellant Central would seem somewhat speculative, at best. Evidence put before the district court in the consent decree proceeding showed that subsequent to the consolidation Central has for a number of years led all other Lexington banks in deposit gain (Doc. 236, Exs. G-J), that it has followed a "policy of paying the highest possible rate on savings" (Doc. 236, Ex. E), and that it has claimed to be "the most modern bank in the Lexington area incorporating every conceivable banking service." (Doc. 236, Ex. D.) Its share of the total bank deposits in Lexington has increased from 9.66% to 15.51% since the consolidation (while First Security's share has decreased from 51.94% to 47.43%). Central has achieved this rapid growth in market share by capturing over 21% of the total growth in deposits of all Lexington banks. In addition, Central's share of total banking offices in Lexington has increased from 6.67% to 15.38%, while First Security's has decreased from 40% to 26.92%. (Doc. 236, Ex. R.)

action. Indeed, this Court has only recently recognized that where an antitrust consent decree does not impair or impede an interested private party's right to prosecute an action for treble damages, it may be appropriate not only to enter the decree over the private party's objection, but also to deny that party permission to intervene in the consent decree proceeding itself. *City of New York* v. *United States*, — U.S. — (Apr. 22, 1968), *affirming per curiam, United States* v. *Harper & Row Publishers, Inc.*, Civ. No. 67 C 612 (and related cases) (N.D. Ill. 1967).

III. THE BANK MERGER ACT AMENDMENT OF 1966 IS NOT UNCONSTITUTIONAL AS APPLIED IN THIS CASE

Appellants attack the constitutionality of the 1966 amendment to the Bank Merger Act on three grounds: Both appellants contend that the "forgiveness" provision of the amendment violates the principle of separation of powers. In addition, Boyle contends that this provision violates the Fifth Amendment (1) by depriving stockholders of the constituent banks in the consolidation of "private vested rights" under the earlier judgment in this case, and (2) by arbitrarily discriminating between insured banks and uninsured banks.

A. The 1966 Amendment Does Not Violate the Principle of Separation of Powers.

Appellants contend that Congress has no power to "vitiate" or "overrule" a final judgment of a federal court. Therefore, they argue, the enactment in 1966 of a conclusive presumption of legality as to any bank merger consummated prior to June 17, 1963 and not dissolved pursuant to a final antitrust decree as of the date of the enactment is unconstitutional.

These assertions are clearly erroneous. The power of Congress to obviate final judgments of federal courts was settled by this Court over 100 years ago in *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855).

In *Wheeling Bridge* the State of Pennsylvania had filed an original action in this Court to abate a bridge across the Ohio River. The Court held that the bridge was an unlawful obstruction to commerce and decreed that it either be elevated or abated. *Pennsylvania* v. *Wheeling and Belmont Bridge Co.*, 54 U.S. (13 How.) 518, 625 (1852). In addition, the Court awarded costs to the plaintiff.

Several months after the decree was rendered, but before the bridge had been elevated or abated, Congress enacted a statute providing that the bridge is "hereby declared to be lawful . . . anything in the law or laws of the United States to the contrary notwithstanding." The defendants relied upon this statute

> as furnishing authority for the continuance of the bridge as constructed, and as superseding the effect and operation of the decree of the court previously rendered . . . .

59 U.S. (18 How.) at 429. In response to this defense the plaintiff urged

> that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby in favor of the plaintiff.

59 U.S. (18 How.) at 431. These are precisely the contentions being made in the instant case with respect to the 1966 amendment to the Bank Merger Act.

The Court acknowledged in *Wheeling Bridge* that, as a general principle, when a court renders a final judgment with respect to the private rights of parties, the rights become absolute and must be enforced. But, it went on to say

> The case before us, however, is distinguishable from this class of cases, so far as it respects that portion of the decree directing the abatement of the bridge. Its interference with the free navigation of the river constituted an obstruction of a public right secured by acts of congress.
>
> But, although this right of navigation be a public right common to all, yet, a private party sustaining special damage by the obstruction may, as has been held in this case, maintain an action at law against the party creating it, to recover his damages; or, to prevent irreparable injury, file a bill in chancery for the purpose of removing the obstruction. In both cases, the private right to damages, or to the removal, arises out of the public right, which, as we have seen, is under the regulation of congress. Now, we agree, if the remedy in this case had been an action at law, and a judgment rendered in favor of the plaintiff for damages, the right to these would have passed beyond the reach of the power of congress. It would have depended, not upon the public right of the free navigation of the river, but upon the judgment of the court. The decree before us, so far as it respect the costs adjudged, stands upon the same principles, and is unaffected by the subsequent law. *But that part of the decree, directing the abatement of the obstruction, is executory, a continuing decree, which requires not only the removal of the bridge, but enjoins the defendants against any reconstruction or continuance.*

59 U.S. (18 How.) at 431. (Emphasis added.)

Just as the Court's decree in *Wheeling Bridge* directing abatement of the bridge was executory, the district court's March 18, 1965 order of divestiture in this case was executory when the 1966 amendment was enacted. In neither case had the action that had been commanded by the decree been carried out at the time the curative statute was enacted. In such circumstances Congress can constitutionally act so as to legalize the conduct previously found unlawful.[27]

The rule of *Wheeling Bridge* remains unchanged to this day. In case after case the principle has been reaffirmed that where curative legislation intervenes between the rendering of a final injunctive judgment vindicating public rights and the execution of that judgment, the decree cannot be enforced. *See, e.g., The Clinton Bridge,* 77 U.S. (10 Wall.) 454 (1871); *United States* v. *Klein,* 80 U.S. (13 Wall.) 128, 146 (1872); *Mills* v. *Green,* 159 U.S. 651, 655-56 (1895); *Hodges* v. *Snyder,* 261 U.S. 600, 603-04 (1923); *System Federation No. 91* v. *Wright,* 364 U.S. 642, 649-50

[27] Appellant contends that *Wheeling Bridge* must be rationalized as a case in which execution of the decree would be "futile", because the bridge could immediately thereafter have been lawfully reconstructed. They contend that this "futility" is not present in the instant case because the amended Bank Merger Act would have precluded a "remerger". The fallacy in this argument is that it ignores the indisputable intention of Congress to legalize *this* merger under section 1 of the Sherman Act. If Congress had believed there was any serious constitutional problem with the provision it enacted, it could just as easily have exempted these banks and this merger *prospectively* from the operation of section 1, making it "futile" to execute the lower court's divestiture order. Under such circumstances, even appellants would concede that no constitutional problem was present. Since the intent of Congress was clear, there seems little reason to accept appellants' strained rationalization of *Wheeling Bridge.*

(1961); *Western Union Telegraph Co.* v. *I.B.E.W., Local No. 134,* 133 F.2d 955, 957 (7th Cir. 1943).[28]

B. Appellant Boyle Has Not Been Deprived of Vested Rights.

Appellant Boyle was a shareholder in each of the constituent banks prior to the consolidation. His intervention in this proceeding was allegedly to protect the "vested rights" of old First National and Security Trust and their stockholders. He contends that the district court's divestiture order of March 18, 1965 "required the recreation of Security Trust" and that the order therefore "vested in both First National and Security Trust the right to be recreated." (Boyle Jurisdictional Statement, p. 23) By enacting "forgiveness" legislation, he says, Congress unconstitutionally divested these rights.

Boyle's argument, however, is based upon a patent misconstruction of the order of March 18, 1965. That order did *not* direct that First National and Security Trust be "reestablished" and that all former stockholders be returned to their original positions in each bank. The order simply directed that a new bank be created as a "separate, competitive and independent" bank out of the capital, assets and deposits of First Security and that the new bank "be the *equivalent* of the former Security Trust Company." (Jurisdictional Statements, p. 20a) (Emphasis added.) The clear purpose of this directive was simply to create

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[28] Appellant Central cites *System Federation No. 91* v. *Wright, supra,* for the proposition that it is merely a matter of judicial discretion whether an intervening act of Congress will have the effect of modifying an earlier decree. Central fails to point out, however, that *System Federation No. 91* involved the effect of an enactment upon a *consent* decree, for which the parties had bargained.

a new banking institution so that there would be the same number of competitive entities in Lexington as there were prior to the consolidation. Nothing in that order evidenced any intention to confer private rights upon either the preexisting banks or their shareholders.[29]

C. The 1966 Amendment Does Not Create Arbitrary Discriminations.

Appellant Boyle argues that the 1966 amendment is unconstitutional because it creates arbitrary and unreasonable discrimination by granting antitrust immunity to insured banks that merged prior to June 17, 1963 while granting no similar immunity to insured banks that merged after that date, or to uninsured banks, or to nonbanking corporations.

It might be noted that Boyle does not claim that the 1966 amendment discriminates *against him.* He simply argues discrimination in the abstract. It is well settled that one to whom application of a statute is constitutional has no standing to attack the statute on the ground that it might apply to other situations in which its application may be unconstitutional. *United States* v. *Raines,* 362 U.S. 17, 21 (1960); *Heald* v. *District of Columbia,* 259 U.S. 114, 123 (1922). Apart from his lack of standing, however, the argument is wholly without merit.

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[29] The district court's 1965 decree simply provided for a pro rata "spin-off" of the stock of the new bank to First Security shareholders. Appellant Boyle is patently in error, therefore, in stating that the decree created a right in him to hold stock in the two banks "as he had prior to their consolidation." (Jurisdictional Statement, p. 23.) His relative equity in the two banks after execution of the decree would have borne no relation to his relative equity in the constituent banks prior to the consolidation.

In 1960, when Congress first undertook to impose federal controls over bank mergers, it elected to use federal deposit insurance as the nexus for the assertion of a federal interest. The Bank Merger Act of 1960 enacted an amendment to section 18(c) of the Federal Deposit Insurance Act, 74 Stat. 129. Thus, banks that were not federally insured, which at that time accounted for only 3% of the country's total bank deposits, were not subject to these restraints. H. Rep. No. 1416, 86th Cong., 2d Sess. (1960). In its role as insurer of accounts the federal government had an obvious interest in the health of the banking industry, and it was clearly reasonable for Congress to relate the new restraints to this role.[30]

CONCLUSION

The merger of First National and Security Trust has been under attack for over seven years. Although the Government's section 2 charges remained alive after the 1966 amendment to the Bank Merger Act, the only judgments ever entered on those charges were adverse to the Government. After lengthy negotiations, the parties arrived at an agreed form of judgment that would not only terminate this protracted litigation, but would impose upon First Security substantial restrictions. Given the uncertainty of the ultimate outcome of the litigation, the peculiar difficulties of effecting a divestiture in a bank merger case, and the clear Congressional purpose in the 1966 amendment to relieve "pre-*Philadelphia*" mergers such as this from these difficulties, the agreed form of judgment that was

[30] Indeed, a substantial Constitutional question might well have been raised had Congress attempted to extend this regulatory scheme to noninsured banks having no federal connections.

accepted and entered by the court below was entirely reasonable.

The appellee banks contend that continued litigation of this case is manifestly not in the public interest and that if the appellants have any private rights to vindicate they may attempt to do so in a private action under the Clayton Act. Accordingly, we submit that this proceeding should at last be brought to an end and that the judgment of the district court should be summarily affirmed.

Respectfully submitted,

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